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No. 02-1221

IN THE

Supreme Court of the United States

United States Shoe Corp.,
Petitioner,
v.
United States of America
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF ELLIOTT TURBOMACHINERY COMPANY, INC., NASHUA CORPORATION, AND VENTURE COKE COMPANY AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

STATEMENT 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE COURT OF APPEALS MISREAD THE GOVERNING STATUTE 3

A. THE LEGISLATIVE SETTING OF THE HMT 3

B. THE STATUTE AUTHORIZING INTEREST ON COURT ORDERED INTERNAL REVENUE TAX REFUNDS APPLIES TO REFUNDS OF EXPORT-RELATED HMT PAYMENTS. 4

CONCLUSION 7

TABLE OF AUTHORITIES

FEDERAL CASES

IBM Corp. v. United States, 201 F.3d 1367 (Fed. Cir. 2000), reversed 1, 4

United States Shoe Corp. v. United States, 296 F.3d 1378 (2002) 1

United States v. United States Shoe Corp., 523 U.S. 360 (1998) 1

FEDERAL STATUTES

26 U.S.C. §4462(f)(1) 5

26 U.S.C. §4462(f)(3) 4, 5

28 U.S.C. §2411 ..... 1, 2, 3, 6

19 U.S.C. §§ 1505(c), (d) 3

INTEREST OF AMICI CURIAE

The *amici curiae* submitting this brief are, like Petitioner United States Shoe Corporation, exporters of commercial goods by ocean vessel.[1] Their claims for interest on illegally collected federal Harbor Maintenance Taxes on exports remain before the Court of International Trade while this test case is litigated. They have a financial stake in the outcome of the question for which review is sought – whether petitioner is entitled to interest on refunds of Harbor Maintenance Taxes collected in violation of the Constitution.

This *amicus curiae* brief is being filed with the consent of all parties. Petitioner has filed a global consent to the submission of amicus briefs in support of either party, which is on file with the Clerk. Respondent's letter consenting to the filing of this brief accompanies this filing..

STATEMENT

This case concerns the federal Harbor Maintenance Tax (HMT), 26 U.S.C. §§ 4461-62, an ad valorem tax

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[1] No counsel for any party authored any part of this brief. No persons other than *amici curiae* and their counsel made a monetary contribution to the preparation and submission of this brief.

The *amici curiae* are Elliott Turbomachinery Company, Inc., Nashua Corporation and Venture Coke Company.

imposed since 1987 on merchandise imported into, and exported from, the United States by ocean vessel. In *United States v. United States Shoe Corp.*, 523 U.S. 360 (1998), this Court held that the tax, as imposed on exports, was unconstitutional as a violation of the Export Clause (art. I, § 9, cl. 5) of the Constitution of the United States.

On remand following this Court's holding of unconstitutionality of the export HMT, the Court of International Trade granted Petitioner's motion for interest on its refund of illegally collected HMT payments. *United States Shoe Corp. v. United States*, Pet. App. 111a-113a. The Court of Appeals for the Federal Circuit, relying on an earlier decision denying interest on HMT refunds (*IBM Corp. v. United States*, 201 F. 3d 1367 (Fed. Cir. 2000), reversed the award of interest, holding that neither 28 U.S.C. §2411 (authorizing interest when a court orders a refund of internal revenue taxes), any other statute, nor the United States Constitution provided a basis for Petitioner to receive interest on refunded Harbor Maintenance Taxes. *United States Shoe Corp. v. United States*, 296 F. 3d 1378 (2002).

SUMMARY OF ARGUMENT

Title 28 USC §2411 provides, simply and directly that, "[I]n any judgment of any court rendered . . . for any overpayment in respect of any internal revenue tax, interest shall be allowed from the date of payment . . . . " The Court of Appeals' conclusion that Congress excluded the HMT from the purview of this interest statute is wrong. The HMT, codified in the Internal Revenue Code, is an internal revenue tax, and 28 U.S.C. § 2411 applies to internal revenue taxes. While the HMT was to be subject to the

administrative and enforcement provisions of the customs laws, the interest provisions of 28 U.S.C. § 2411 (a section of the judicial code) remain applicable to it. The Court of Appeals' contrary decision attributes to Congress an intent to deny to taxpayers interest on refunds of these unconstitutionally collected taxes, an intent which Congress has never manifested under either the internal revenue or customs laws.

ARGUMENT

I. The Court of Appeals Misread the Governing Statute

A. The Legislative Setting of the HMT

The HMT is a statutory hybrid. The obligation to pay taxes on the value of merchandise imported and exported by sea was enacted into the Internal Revenue Code, Title 26 U.S.C., but Congress provided that the administrative and enforcement provisions of the customs laws were to apply to it: [A]ll administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] as if such tax were a customs duty." 26 U.S.C. § 4462(f)(1). The statute also provided, correlatively, that the HMT "shall not be treated as a tax for purposes of subtitle F [of the Internal Revenue Code] or any other provision of law relating to the administration and enforcement of internal revenue taxes." 26 U.S.C. §4462(f)(3).

Thus, the HMT was given its legislative birth in the tax code, where it remains, but it was to be administered and enforced as part of the customs laws of the United States. Since Congress has provided for interest on refunds of

internal revenue taxes (28 U.S.C. §2411), and has provided for interest on refunds of customs duties (19 U.S.C. §§ 1505(c), (d)), one would have thought that one or both of these statutes would authorize interest on refunds of export HMT overpayments. But the Court of Appeals held otherwise, concluding that neither statute authorized such interest.

B. The Statute Authorizing Interest on Court Ordered Internal Revenue Tax Refunds Applies to Refunds of Export-Related HMT Payments.

The Court of International Trade held that interest was owed on HMT refunds under 28 U.S.C. §2411, a provision not of the tax code but of the judicial code. The statute reads as follows:

> In any judgment of any court rendered . . . for any overpayment in respect of any internal revenue tax, interest shall be allowed from the date of payment . . . .

There was no sound reason for the Court of Appeals to hold this interest statute inapplicable to export HMT refunds. First, the HMT is an internal revenue tax – Congress labeled it a tax and enacted in into the Internal Revenue Code. This Court viewed the HMT as a tax in the first *U.S. Shoe* case, 523 U.S. at 367, and the Court of Appeals for the Federal Circuit, in *IBM Corp. v. United States*, 201 F. 3d 1367, 1372 (CAFC 2000), was explicit on this point: "Thus both the structure and content of the HMT point toward it being an internal revenue tax . . . ."

As such, it would appear to follow that Section 2411 should apply to HMT refunds. But the Court of Appeals disagreed. It adopted the reasoning of *IBM* that the language of the HMT statute -- excluding from application to the HMT the administrative and enforcement provisions of the internal revenue laws, and applying to the HMT the administrative and enforcement provisions of the customs laws – precluded the applicability of Section 2411.

But in order to reach such a conclusion, one must first conclude that Section 2411 relates "to the administration and enforcement of internal revenue taxes." Again, the Court of Appeals adopted the reasoning of the *IBM* court that Section 2411 did so relate.

But such a conclusion does not withstand analysis. First, Section 2411 is not even located in the Internal Revenue Code. Instead, it is located in Title 28 of the United States Code (Judiciary and Judicial Procedure), and provides for interest on tax refunds ordered as a result of court proceedings. As such, Section 2411 is a provision of law concerning the administration of justice, not the administration of the internal revenue taxes, and so the exclusion from the HMT of "any other provision of law relating to the administration and enforcement of internal revenue taxes" (26 U.S.C. §4462(f)(3)) does not apply to this provision of the judicial code.

Second, the terms "administration" and "enforcement" simply do not describe the interest authorization of Section 2411. Black's Law Dictionary defines "administration" as "management or conduct" and "enforcement" as "[t]he act of putting something, such as a law, into effect; the execution of a law." (Black's Law Dictionary 44, 528 (6th ed. 1990).) The Internal Revenue

Service (IRS) manages and enforces the internal revenue tax sustem: Among other things, it collects the taxes and follows administrative procedures for refunding overpayments. When such administrative procedures fail, however, and a *court* orders the government to pay interest on the refund of a tax overpayment under Section 2411, the *court* is neither "managing" nor "putting into effect" the underlying taxes. It is providing a *judicial* remedy for an excessive tax collection. Section 2411 thus does not relate to the "administration and enforcement" of internal revenue taxes, and so was not excluded from the HMT statute by 26 U.S.C. §4462(f)(3).

The government may offer another argument why Section 2411 does not apply to refunds of export HMT payments: the exclusion of administration and enforcement provisions of the tax laws extends to Section 2411 because the HMT's adoption of the administration and enforcement provisions of the customs laws (26 U.S.C. §4462(f)(1)) supplants every internal revenue tax statute that might otherwise apply. But since the government has consistently argued that no interest provision of the customs laws applies to export HMT refunds, and the Court of Appeals for the Federal Circuit has agreed with that position in the case below, 296 F. 3d at 1381-82, Section 2411 has not (at least according to the court below) been replaced by another interest statute. It remains, as the Court of International Trade originally held, as an interest statute that applies to export HMT refunds.

CONCLUSION

The petition for a writ of certiorari should be granted, to consider whether 28 U.S.C. §2411 authorizes interest to be paid on refunds of unconstitutionally collected Harbor Maintenance Taxes. Denial of the petition would leave standing a remarkably unfair decision that Congress' enactment of an internal revenue tax statute, to be administered and enforced as a customs law, was exempt from Congress' general authorization to pay interest on court-ordered refunds of internal revenue taxes.

Respectfully submitted,

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